

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIA HENRY, et al.,

Plaintiffs,

vs.

BROWN UNIVERSITY, et al.,

Defendants.

) Docket No. 22 C 125

) Chicago, Illinois
) February 8, 2023
) 9:15 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY

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1 (The following proceedings were had by video:)

2 THE CLERK: Case 22 C 125, Henry v. Brown University.

3 THE COURT: So I know we got, you know, a lot of
4 people on, most by phone. I'm going to suggest we do this the
5 way we've done all of them, which is that anybody who wants to
6 give your name for the record, please do so. But anybody
7 who's on by phone only, you need to mute your phone right now.
8 If I have to mute you more than once, I'm going to cut you
9 off.

10 Okay. So go ahead in terms of people who are on
11 video that want to give your names.

12 MR. GILBERT: This is Robert D. Gilbert from Gilbert
13 Litigators and counselors on behalf of the plaintiffs.

14 MR. NORMAND: It's Ted Normand from Freeland Norman
15 Freeland for the plaintiffs as well, your Honor.

16 MS. MILLER: Your Honor, this is Britt Miller from
17 Mayer Brown on behalf of Georgetown. We previously sent to
18 your clerk and to the court reporter a list of all of the
19 defense counsel who would be appearing on the record today so
20 we didn't have to do this. If your Honor would like us to
21 formally appear, we can, but we sent that list.

22 THE COURT: That's great. That covers it. I
23 appreciate you doing that.

24 Okay. So I'm going to dispense with asking anybody
25 else for your names at this point. But all I'll ask is that

1 when you talk, just say who you are so the court reporter can
2 get it down.

3 We have an awful lot to cover and not an eternity to
4 cover it.

5 So I'll tell you where I actually want to start is
6 with I think the last set of things that were filed, and that
7 is the motion by some defendants for entry of an order
8 regarding the HEA statute and production of certain FAFSA
9 information. So for the benefit of the court reporter, FAFSA
10 is F-A-F-S-A, all capitals.

11 I got something on Monday from Cornell, and I'm
12 hoping the lawyer from Cornell is on here because I don't
13 understand what you're asking me to do or telling me to do.
14 You kind of state a position here, but you don't really tell
15 me what you think I should do. So tell me.

16 MR. FARDON: Your Honor, good morning. Zach Fardon
17 for Cornell. Your Honor, the reason we filed the position
18 paper is we do differ from the other defendants only in this
19 narrow regard. They're asking the Court to enter a finding
20 that collection of production and use of FAFSA data in this
21 litigation is part of administration of -- as that term is
22 used in the HEA. And Cornell's concern is there's no case law
23 that says that.

24 And unlike the other universities, Cornell does not
25 believe that such a permissive interpretation of the HEA is

1 necessarily consistent with the limited existing education
2 department guidance on the issue or the -- yes, sir.

3 THE COURT: So you're just repeating what I already
4 read. Did you remember my question, Mr. Fardon? So let's
5 answer that in the next words that come out of your mouth.

6 MR. FARDON: Your Honor, we had submitted an inquiry
7 to the education department where custodians of that data --

8 THE COURT: Stop. What are you asking me to do? I
9 mean, you came out and stated your position. I get that. I
10 understand your position. What are you asking me to do? Are
11 you asking me to enter -- to not enter an order, to enter some
12 order different from one that's provided or what?

13 MR. FARDON: Your Honor, we would like either
14 guidance from the education department or suggest the Court
15 seek guidance from the education department as to what their
16 position is.

17 THE COURT: So I'm supposed to ask the education
18 department what I should do? That's your position? That's
19 what you just said.

20 MR. FARDON: Your Honor, we have submitted an
21 inquiry, and we wanted the comfort of knowing what the
22 education department's position is on this.

23 THE COURT: So your position right now is that it's
24 not covered, right, that you can't turn this stuff over?
25 That's got to be your position, otherwise, you wouldn't be

1 asking for guidance.

2 MR. FARDON: That's right, your Honor.

3 THE COURT: Okay. So stop. This case was filed in,
4 when, January a year ago, so it's about 13 months old. And I
5 went through all of these motions to dismiss. You know,
6 extensive briefing was filed, and the -- you know, because
7 it's absolutely 100 percent without question crystal clear
8 that in order to litigate the case, disclosure of this
9 information is needed because it goes to the core of what's
10 alleged.

11 That if your position was what you just said it is, I
12 should have gotten a motion to dismiss like eight months ago
13 saying, you got to dismiss the case, Judge, because the
14 plaintiffs aren't going to be able to get the information
15 because it's illegal. I never got that motion. So why
16 shouldn't I just consider you to have forfeited your position?

17 MR. FARDON: Judge, we're only talking about FAFSA
18 information here, this limited set of data. We're not
19 objecting to production of relevant financial --

20 THE COURT: So you guys have asked for FAFSA
21 information from the plaintiffs, haven't you?

22 MR. FARDON: I'm not aware, your Honor. Perhaps
23 someone else --

24 THE COURT: That's half of the briefing on the stuff
25 I got to deal with today is you wanting the plaintiffs to

1 provide the FAFSA forms and all the information that underlies
2 them that they submitted during whatever years in question.
3 Am I wrong about that?

4 MR. FARDON: I do not believe you're wrong, your
5 Honor.

6 THE COURT: Okay. So what is -- the prohibition
7 doesn't apply when it's going the other way?

8 MR. FARDON: It's not that, your Honor. It's that we
9 can find no precedent, and we are contractual in private -- to
10 oversee obligations as custodians of this data to the
11 education department, and we just wanted to raise this
12 position with the Court.

13 THE COURT: Thanks.

14 Is there anybody on the defense side that agrees with
15 Cornell's position on this? If so, you need to tell me right
16 now, whether you're on video or not.

17 MR. RUBIN: Your Honor, this is Michael Rubin from
18 Arnold Porter for University of Chicago, and I am here to
19 speak on behalf of the other defendants. And all the other
20 defendants joined in the motion to have the FAFSA order
21 entered. That's an answer to your question.

22 THE COURT: Actually, it's not even close to an
23 answer to my question. My question was real simple. Does
24 anybody agree with Cornell's position that this material can't
25 be turned over? So that's a question that can be answered yes

1 or no and so --

2 MR. RUBIN: No, your Honor.

3 THE COURT: Okay. So no other defendant agrees with
4 that.

5 All right. So, basically, Cornell's position is that
6 I should just put the brakes on the litigation and just sit
7 back and wait for a federal bureaucracy to respond to an
8 inquiry that's been made.

9 When did you make the inquiry?

10 MR. FARDON: January 17th, your Honor.

11 THE COURT: Why did you wait so gosh darn long?

12 MR. FARDON: Your Honor, once we identified this
13 specific concern and couldn't find any precedent for the
14 concern, we submitted the inquiry.

15 THE COURT: When did you get the request that this --
16 that would have called for this information? When was that
17 served?

18 MR. FARDON: I don't have that date handy, your
19 Honor. I apologize.

20 THE COURT: Somebody? Ballpark.

21 MR. GILBERT: September 19th, your Honor. This is
22 Robert Gilbert speaking. September 19th, your Honor.

23 THE COURT: That would be four months before,
24 Mr. Fardon, you guys made the request to the education
25 department. I mean, seriously, with a straight face, you are

1 telling me that I should wait on this. Well, my view is the
2 position has been forfeited twice. It's been forfeited once
3 because the upshot of this position is that the litigation
4 can't proceed because it's been clear from day one that this
5 type of information is needed in order to pursue the
6 litigation. So it should have been raised as part of a motion
7 to dismiss.

8 Secondly, you forfeited it by waiting four months
9 after you got the request to even ask the education
10 department, not even ask me. You waited three more weeks to
11 do that.

12 So the only other question I have about this one then
13 is that in the last document that I got, which was from the
14 plaintiffs, there was a proposed tweak, I guess is what I
15 would call it, of the draft order. And I have the -- I don't
16 want to share it because that's just going to be too
17 cumbersome. I've got the plaintiffs' proposed version of this
18 up on my screen now.

19 And so my question on the -- to whoever is the
20 spokesperson for the defense, which seems like it's Mr. Rubin
21 on this, at least, is do you have any problem with the
22 proposed tweaks by the plaintiff? And, if so, tell me what I
23 should untweak and where because I didn't get a redlined
24 version of it.

25 MR. RUBIN: Yes, we do have a problem, your Honor.

1 We submitted this order for the narrow purpose of getting this
2 data to the plaintiffs and getting it produced. The
3 plaintiffs want to address before they've ever seen the data
4 and ask the Court to hold before ever seeing the data whether
5 the file that we produce the data in to be produced as
6 confidential versus highly confidential -- outside eyes only,
7 attorneys' eyes only.

8 THE COURT: Stop right there. Stop right there. I
9 don't need to decide that right now. So if that's what the
10 plaintiff is asking me to do, I don't need to do that. So do
11 I have a draft order somewhere from the defendants on this?
12 If you can just tell me when it got sent, because, honestly,
13 my proposed order in-box is kind of full of orders for this
14 case.

15 MR. RUBIN: Yes, it was sent at, I believe it was, on
16 Friday, this past Friday, the 3rd.

17 THE COURT: February 3rd. Okay. All right.

18 MR. RUBIN: Actually, it was technically the 4th,
19 around 2:00 a.m.

20 THE COURT: Okay. That will be easy to find. All
21 right. Thanks. All right. That's done on that.

22 Okay. What I want to do next -- I guess I'm going to
23 kind of try to go back and go through this more or less
24 sequentially. On most of these -- on some of these, I don't
25 even have any questions. I'm just going to tell you what the

1 rulings are. That's going to be the case on the one where
2 there's a whole laundry list of stuff. On some of them, I
3 have a question or two. And on maybe one or two, I'm going to
4 need to hear a little bit more argument.

5 So the first one I've got is the dispute about
6 numbers of depositions and lengths. And so what this boils
7 down to, as I understand it, is a dispute over whether the
8 plaintiff gets to do only one or more than one 30(b)(6)
9 deposition of each defendant.

10 So to me, the way I read the defendant's position, it
11 kind of seems to assume that there is some sort of a rule or
12 precedent or whatever that a party only gets one 30(b)(6)
13 deposition of the other side. It all has to be done at once.
14 I'll just tell you that that's completely inconsistent with my
15 experience in complex litigation. But if there's something
16 that says that somewhere, I'd appreciate somebody on the
17 defense side telling me what it is.

18 MS. MILLER: Your Honor, Britt Miller for Georgetown.
19 I think the defendants' position was simply that in order to
20 be able to meaningfully schedule these, including the
21 possibility of individual 30(b)(1)s being overlapped with
22 30(b)(6)s, that the identification of the 30(b)(6) topics are
23 told to us up front so that we can appropriately prepare a
24 witness or witnesses and ensure that our witnesses are not
25 taken in duplicative order; i.e., a 30(b)(6) follows six

1 months after we've done most of the depositions or vice versa
2 is an interest of efficiencies and to ensure that our clients
3 are not unduly burdened.

4 THE COURT: Okay. I mean, kind of imbedded within
5 your answer is it was probably an unintentional concession
6 that 30(b)(6)s aren't limited to one because you said witness
7 or witnesses. That's the norm, actually, in complex
8 litigation is it takes more than one witness. And so by
9 definition it's not one deposition.

10 So here's the deal. I'm going to limit it to -- I'm
11 going to limit it to two per defendant. And I'm just going to
12 say that's a number I am pulling out of the air. Okay? So if
13 somebody wants to call that arbitrary, you're right. It is.
14 So that's the adjudication of that dispute.

15 The next one I want to talk about is the subpoenas to
16 the parents. A couple of questions.

17 So let me just say by way of preface, it seems to me
18 the question is whether there's anything that's relevant and
19 not disproportionate. And if that's -- if the answer to those
20 questions is yes, I'm really not inclined to require the
21 defendants to go through the plaintiffs' lawyers on this.

22 So the categories are -- there's five of them, as I
23 understand it. Number one would be financial aid applications
24 and underlying materials.

25 Number two would be records regarding other forms

1 of -- other forms of financial aid.

2 Three would be documents regarding the payment of
3 tuition and expenses.

4 Four would be college applications and communications
5 about them.

6 And five would be documents regarding, quote/unquote,
7 this litigation.

8 So I will tell you there's a lot of ink spilled I
9 think in both sides' submission over this whole question about
10 who's a direct purchaser and what's downstream and all that.
11 I am -- that strikes me as an issue that's going to have to be
12 decided on the merits. I am strongly, strongly disinclined to
13 do that now in the context of deciding a discovery motion. So
14 I'm inclined to bypass it.

15 So I'm going to start with request No. 5 because
16 that's an easy one. That's the one about documents regarding
17 the litigation. And that's a paraphrase, but I see that in
18 the defendants' submission, which kind of gives the
19 categories.

20 It's too vague and overbroad. I'm not allowing that
21 one.

22 Now we're going back to number one, financial aid
23 applications to the defendant universities. Are we talking
24 about the FAFSA form? Is that what we're talking about? I
25 mean, it's been a while since I was in the business of helping

1 kids apply to universities, but, I mean, in the old days, at
2 least, you submitted a FAFSA form. And some schools had an
3 additional form that they needed you to submit. So when
4 you're asking about financial aid applications, can you just
5 tell me, on the defense side, physically what it is you're
6 talking about.

7 MR. SUGGS: Your Honor, this is David Suggs for
8 Vanderbilt. We're talking about whatever form the plaintiff
9 submitted, as you said. There may be --

10 THE COURT: That's not what I'm asking you. Okay.
11 So you speak for Vanderbilt. What is it at Vanderbilt? What
12 do they -- what do people submit?

13 MR. SUGGS: Nowadays, your Honor, it comes through
14 the college board, and there's a form. So it's filtered
15 through the third party, and Vanderbilt just kind of gets the
16 data, not the form directly.

17 THE COURT: And at the time of the lawsuit, which
18 probably isn't right now, but let's say five years ago or
19 whatever, was that the case or was it done differently at that
20 point?

21 MR. SUGGS: I don't know when that became the case.
22 The plaintiffs are asking for data going back to the '90s. So
23 there have been changes, but I don't know exactly when the
24 changes occurred. And we're also asking for other information
25 including the underlying --

1 THE COURT: Look, look, look. I got an hour and 15
2 minutes to give you guys, 15 minutes which we've already used.
3 And we've got about 20 minutes to cover, so I'm really just
4 going to ask that people just answer the questions I'm asking.
5 You're now going beyond the question I'm asking.

6 So the short answer is you don't know. My question
7 is -- can somebody else answer this question? What is it
8 we're talking about when you're asking for financial aid
9 applications?

10 MR. RUBIN: Your Honor, this is Michael Rubin for
11 University of Chicago. When the parents submit the FAFSA,
12 they get a return copy of it. So that's one form of it. Then
13 there's the application to the college board called the CSS
14 Profile. That's another piece of it.

15 THE COURT: Got it.

16 MR. RUBIN: And then some schools have their own
17 individual one. Chicago has their own private shorter one.

18 THE COURT: That's helpful.

19 Here's my question. Do the schools, the defendants
20 in this case, in other words, don't you already have this from
21 these applicants? Whatever they sent in, don't you already
22 have it?

23 MR. SUGGS: Your Honor, we have it for the
24 defendants, but we don't have it for other schools to which
25 the plaintiffs applied. And if any of those schools used

1 customized forms, then we wouldn't have those, even if we have
2 the FAFSA or CSS Profile. And, again, we don't have the
3 underlying documents.

4 THE COURT: I thought that this request was for
5 financial aid applications to the defendant universities.
6 Does it go -- did I misread it? Does it go beyond that?

7 MR. SUGGS: Your Honor, it does go beyond. It asks
8 for all documents about the plaintiffs' applications for
9 financial aid, any decision concerning the application,
10 documents used in connection with the application.

11 THE COURT: Okay. I'm just trying to get a handle on
12 it.

13 Okay. So here's the ruling. Okay? I am not, repeat
14 not, allowing subpoenas for the -- what you refer to as the
15 underlying materials; in other words, I gather the materials
16 that would -- that were used to prepare the forms. I think
17 that is largely, if not entirely, a fishing expedition
18 regarding whether financial aid applications were truthful or
19 not. There's no showing that that's likely to be a relevant
20 issue in this case.

21 Even if so, even if it were, it's extremely
22 tangential and it's not fair, reasonable, or proportionate for
23 a non-party to a lawsuit. So you can subpoena the parents for
24 the materials that were actually submitted to universities,
25 but that's it. That's request one.

1 Request two, this is the one for other forms of
2 financial aid. Give me one second here. I just got to
3 decipher my notes. So on some of these, as I said, I'm just
4 going to rule.

5 The defendants argue that this is important in order
6 to compare financial aid offers and that it might show the
7 non-existence of collusion or the absence of impact of
8 collusion. I think that has some potential relevance. I
9 think the same thing about records regarding financial aid
10 offers from other sources. I'm not buying into the no injury
11 argument that the defendants make. It's really super thin on
12 authority. But, nevertheless, I think this information could
13 have some relevance, so that one is okay.

14 Category No. 3 concerns documents regarding tuition
15 and other payments. I'm really not understanding the
16 relevance of this, and the defendants really don't make much
17 of an effort in this submission to explain it, so that one is
18 a no.

19 And then the last one is communications regarding
20 attending -- reasons for attending a particular school or
21 discussing the pros and cons or the merits -- relative merits
22 of schools.

23 So the only thing that comes close to hitting the
24 relevance mark on this -- and by close, I don't mean close --
25 is that this has a bearing on the relevant market. I just

1 have to say I think the opinions of parents and the students
2 are unlikely to even be relevant on that. Or if they're
3 relevant, the probative value of it is quite minimal. You can
4 certainly ask people what schools they applied to and why, how
5 they compared them. But basically what you're asking for is
6 for people to go back in all likelihood into their emails,
7 going back eight or ten years in some cases, maybe even more.
8 And I just think it's beyond disproportionate.

9 So the bottom line is the defendants can subpoena the
10 plaintiffs' parents for their applications -- their -- excuse
11 me -- the financial aid applications to other schools -- I do
12 think it's more likely that a parent would have kept that than
13 a kid -- their financial aid offers from other schools or from
14 third parties, and that's basically it.

15 Okay. That's the ruling on that one.

16 MR. NORMAND: Your Honor, Ted Normand for the
17 plaintiffs. I apologize if I missed this. You made an
18 opening reference to the extent which defendants would be
19 interacting with the parents.

20 THE COURT: They can subpoena them. They don't have
21 to go through you.

22 MR. NORMAND: For purposes of the subpoena,
23 understood, your Honor.

24 THE COURT: Well, I mean, that's all I'm being asked
25 to decide.

1 Okay. Next item. Okay. So I'm actually going to
2 skip ahead just in sequence. This is the defendants' motion
3 to compel. This is the one that basically has the list of
4 various interrogatories and requests for production.

5 There may be one or two I have questions on, but I
6 don't think so. So I'm just going to go through. I'm just
7 going to tell you, it is not likely that I am going to go back
8 and issue a written ruling on all of this stuff. It's just
9 going to say granted in part, denied in part, as stated on the
10 record. So just either take really great notes or order the
11 transcript.

12 Excuse me one second.

13 Okay. Starting with interrogatories 1 and 2, that's
14 parallel with something I just talked about. That has to do
15 with applications for admission and financial aid in documents
16 regarding other sources of financial aid that was actually
17 received. Those are enforced for the reasons that I just
18 discussed on the parents' subpoena.

19 Interrogatory number 3 asks for analysis of the
20 relevant market. I think that's premature at this point.
21 It's a contention interrogatory. And contention
22 interrogatories don't always have to wait until closer to the
23 end of discovery, but I think that's appropriate here because
24 everybody who is on this call understands that this is almost
25 entirely going to come from experts. And it's way too early

1 to make people take a position on that, so I'm not enforcing
2 interrogatory 3.

3 The rest are requests for production, I'm basically
4 organizing this. It's not exactly in sequence, but it's in
5 the sequence they're discussed I think.

6 So the first one is request for production of 1 and
7 7, documents regarding the reasons the plaintiff applied and
8 comparing schools. That one -- I think that's relevant, and
9 so I'm enforcing that one.

10 Documents regarding the relevant market, that's not.
11 I'm not enforcing that for the reasons I just discussed. I
12 think one of those is 117. I forget which is which.

13 Request for production 2, applications for admission
14 to the defendant universities. Okay. This one is actually
15 just asking for applications for admission to the defendant
16 universities. I'm trying to figure out why you need to have
17 the plaintiffs produce that. Don't you already have them?

18 MR. SUGGS: Your Honor, in some cases, as we're
19 learning in responding to plaintiffs' discovery request, we do
20 not always have the documents.

21 THE COURT: Really? They don't keep them?

22 MR. SUGGS: Sometimes -- sometimes due to standard
23 document retention policies, the materials are not retained.

24 THE COURT: Okay. Fine. You told me what I need to
25 know. That one is enforced. I think it's relevant.

1 Request for production 3, applications for financial
2 aid, that's essentially parallel to the thing I dealt with on
3 the parents' subpoena. That's enforced, but just the
4 applications, not the underlying or supporting documents.

5 Request for production No. 5, this has to do with
6 third-party scholarships and financial aid from third parties.
7 Again, I'm not taking a position on this direct purchaser or
8 downstream issue that's addressed in the briefs. I'm
9 enforcing this one because I think it could lead to relevant
10 evidence. I'm not positive of that, but close enough.

11 Request for production 6, this has to be -- this has
12 to do with documents regarding getting turned down for
13 financial aid -- no, excuse me -- documents regarding turning
14 down financial aid offers. That's the way I read it. I'm not
15 enforcing that one. It's not relevant as it's described.
16 Anything relevant is otherwise requested and is going to be
17 produced, as I understand it, namely, financial aid offers
18 from other institutions. So to the extent that that's within
19 the scope of 6, that's enforced. Otherwise, it isn't.

20 Request 11 is the next one. My shorthand is
21 documents regarding the circumstances under which the
22 plaintiffs got involved in litigation. I think this is
23 overwhelmingly likely to involve work product or attorney
24 client privilege. It's pretty tangential at best to any
25 relevant issue. It's certainly okay to ask about this at

1 depositions, but I'm not going to at this point require
2 production of documents. You can come back to me on that if
3 something pops out during a deposition that you think you need
4 to see.

5 MR. SUGGS: Your Honor, if I could just -- if I may
6 ask a question?

7 THE COURT: No, you can ask when I'm done.

8 Request for production 12, this is documents
9 regarding fee arrangements and engagement letters. My
10 understanding is that plaintiffs undertook to produce
11 engagement letters. Did that get done? It was supposed to
12 happen I think on January the 30th. Did that get done?

13 MR. SUGGS: No, your Honor, we have not received
14 anything from plaintiffs.

15 THE COURT: You have to produce the engagement
16 letters. But otherwise -- but that's it on that one.

17 Request 18 and 26 are discussed together. These are
18 records regarding loans and modifications and payment
19 histories. I'm not seeing the relevance of that. So
20 basically for the reasons that are discussed in the
21 plaintiffs' memorandum, so I'm not enforcing that one.

22 Request 19, documents regarding satisfaction with the
23 institution and the value of the education, it's just the way
24 it's written, it's overly broad and unduly burdensome given
25 the breadth of it, so I'm not enforcing that one.

1 19 and 21, these are social media user names and
2 documents regarding social media. That's a hard no. It's a
3 fishing expedition, and it's inappropriately intrusive, in my
4 opinion.

5 Request for production 24, documents -- oh, I'm
6 sorry. The documents that the plaintiffs say they've agreed
7 to produce on that, this is page 15 of their response, seems
8 sufficient to me on that one, so I'm not enforcing it beyond
9 that.

10 The last one is loan agreements, and for the reason I
11 said on request 18 and 26, I don't think that's relevant. I'm
12 not enforcing that. So I'm done with this motion.

13 What was your question?

14 MR. SUGGS: Your Honor, with respect to request 11 --

15 THE COURT: As I said at the beginning, every time
16 you talk, say your name so the court reporter doesn't have to
17 go running her cursor across the screen while she's trying to
18 type.

19 MR. SUGGS: I apologize, your Honor. David Suggs for
20 Vanderbilt University.

21 This was the request for documents about how the
22 plaintiffs became involved in the litigation. You stated that
23 you think --

24 THE COURT: Number 11?

25 MR. SUGGS: Yes, sir. You stated that you think the

1 documents are privileged. All we ask is that --

2 THE COURT: That's not what I said. That is actually
3 not what I said. I said -- I'll quote you what I said. Give
4 me a second.

5 What I said was, I think it's overwhelmingly likely
6 to involve work product or attorney-client privilege, and it's
7 pretty tangential at best to any relevant issue.

8 That is what I said.

9 MR. SUGGS: Okay, your Honor. Well, our position is
10 that when they became involved in the litigation --

11 THE COURT: Fine. Look, you filed two briefs on
12 this. I considered your position. I considered your
13 position. I'm not holding oral argument on this. You filed
14 two briefs. That was one more than the plaintiffs filed. I
15 ruled on it.

16 All right. So we're going to go on to the next
17 thing. That is -- hang on a second. Pardon me. The next one
18 is the motion by Brown, Columbia, Dartmouth, Northwestern,
19 Notre Dame, and Yale for a protective order.

20 So now we're getting into kind of more heavy
21 questions I think here.

22 So I want to start off asking the plaintiff a couple
23 of things here, plaintiffs, a couple of things here. So can
24 you give me -- and it's been done in other places, and maybe
25 to some extent in briefing on this. But can you give me kind

1 of a nutshell explanation for how the contention that
2 admissions, at least some admissions, are tied to donations
3 bears on your antitrust claim.

4 MR. GILBERT: This is Robert Gilbert, your Honor.
5 That's a fairly broad question, as I understand it.

6 THE COURT: Basically what I'm asking you to do is
7 explain the relevance of the information about donations and
8 trying to link that to admissions.

9 MR. GILBERT: The culpability of -- as your Honor has
10 ruled on August 15th, the culpability --

11 THE COURT: Stop. Stop. I know what I ruled. I'm
12 just -- I have a reason for doing this, so let's just answer
13 my question without giving me the entire history of time.

14 MR. GILBERT: Okay. It's relevant because the
15 admissions that were wrongdoing at Dartmouth, for example, are
16 evidence of the liability of Georgetown and every other
17 defendant.

18 THE COURT: You're missing my question. Let's say --
19 I'm just talking about on an individual basis. Let's just
20 stick with Dartmouth. Okay? So how does -- let's say just
21 hypothetically that Dartmouth had a practice of giving
22 enhanced consideration or automatic admission to high-level
23 donor's kids. Okay? How would that bear on your proof of
24 Dartmouth's liability for the antitrust conspiracy? Put all
25 the 568 issues to the side for now.

1 MR. GILBERT: Okay. It would show that as to just
2 Dartmouth that Dartmouth was not entitled to an exemption and
3 that it's a pure price fixing collusion case. But it would
4 also show that every other defendant is liable on the same
5 basis.

6 THE COURT: I get the every other thing. You don't
7 need to keep going into it. So the reason it would show that
8 that particular school was not entitled to an exemption is
9 what exactly? I'm not arguing with you. I'm just asking you
10 to explain it.

11 MR. GILBERT: If I understood your question, your
12 Honor, the question is -- I'm sorry. I'm going to have to ask
13 you to repeat it.

14 THE COURT: What does it show? In other words, if a
15 school is tying some admissions to high-level donations, why
16 does that help show that that school is not entitled to a 568
17 exemption? Because --

18 MR. GILBERT: Okay. Now I understand the question.
19 I think I understand the question better, your Honor. I
20 apologize.

21 THE COURT: I just answered it. It was my answer,
22 right, because they're not need-blind, right?

23 MR. GILBERT: They're not need-blind. And
24 "need-blind" means all applicants are admitted, all admittees
25 are admitted without regard to the financial circumstances of

1 the student or the student's family. That's for the whole
2 conspiracy.

3 THE COURT: Pause. I got my answer. I pretty much
4 had to give it myself, but that's okay.

5 Now I'm going to go onto my next hypothetical
6 question. Let's say that every defendant in the case dropped
7 the 568 defense, every defendant drops the 568 defense. Would
8 the donations tied to admissions, quote/unquote, evidence
9 still be relevant, and, if so, why?

10 MR. GILBERT: This is an interesting hypothetical,
11 your Honor. If every defendant dropped it and they admitted
12 that they had violated the exemption --

13 THE COURT: I'm a law professor. Okay? Let's just
14 pretend. You don't get to change the law professor's
15 hypothetical.

16 MR. GILBERT: If they dropped it, then we'd have --
17 every single one dropped it, we'd have a pure price fixing
18 standard collusion case in which they've already admitted they
19 have a formula.

20 THE COURT: You probably wouldn't need it in that
21 situation, right? "It" being the donations tied to
22 information, tied to admission.

23 MR. GILBERT: My initial response to that
24 hypothetical is we would not need it if every single defendant
25 dropped the defense and then this was a pure price fixing

1 formula case.

2 THE COURT: They haven't. They haven't dropped the
3 defense. It's just these six. And how many defendants total
4 do you have in the case?

5 MR. GILBERT: 17.

6 THE COURT: There's another 11 or so that haven't
7 dropped it yet.

8 Okay. Thanks.

9 So my next question is, and this is a more
10 particularized question, as it does relate to the motion.
11 It's not a hypothetical. So part of the thrust of this motion
12 is that, hey, wait a second, we -- we dropped the defense. We
13 don't agree with the argument that if one did it, everybody
14 gets hooked in, but put that to the side. You got 11 other
15 schools you can get this stuff from. You don't really need to
16 get it from us too, and we ought to get something out of
17 having dropping this defense. It's kind of like a
18 proportionality argument.

19 And that's probably putting it more directly than
20 it's put in the motion, but I guess I'd like to get the
21 plaintiffs' take on that. Basically, it's an argument by
22 these six schools, hey, we did something here. We dropped the
23 defense. We should give some credit for that. You can get
24 this information from other schools. You don't really need it
25 from us too because --

1 MR. GILBERT: Your Honor, let me respond in three
2 levels. The first is to slightly amend what I said before.
3 They're still asserting a statute of limitations defense.
4 Okay? If the 17 are still asserting a statute of limitations
5 defense, that means there was -- they say we should have known
6 to file a complaint earlier, which means we should have known
7 that there was wrongdoing that they were concealing. So we're
8 still entitled to find out what they were doing and how they
9 were hiding it. So even if they -- all 17 dropped the --

10 THE COURT: Okay.

11 MR. GILBERT: That's the first point.

12 The second point is, as to the other schools, we have
13 substantial basis to believe that these six schools are the
14 most culpable. I'll just give you three examples, your Honor.
15 And it would be the most efficient to just establish this,
16 that the conspiracy was not need-blind.

17 The first is that Brown has sent a letter that was
18 produced on -- let's see -- I guess it was December 16th. And
19 the letter admits that they were need aware as to transfer
20 students and admits that the other conspirators, all of them,
21 were need aware as to wait list students. So getting -- Brown
22 is the best place to go. Okay? And they're one of the people
23 that filed the motion.

24 The second example, Yale, months after the filing of
25 the complaint, was the subject of an exposé in which Russian

1 oligarch billionaires were making substantial donations to
2 Yale in exchange for their kids getting admitted to Yale.
3 Okay? That's another reason why it would be very efficient to
4 go to these rather than see what we could find at the other
5 11.

6 A third example would be Northwestern. Actually, I
7 want to do four, if you don't mind. Northwestern, there was a
8 student newspaper article that the president had reviewed and
9 spoken to the admissions office about 550 applications in one
10 year, most of which related to donors. Okay? It would be
11 much more efficient to just have discovery about that than to
12 chase around 11 other defendants.

13 The final example I say is Dartmouth. Dartmouth had
14 a senior official whose last name was Sassorossi, whose job
15 for years was to coordinate fundraising and admissions. So
16 the most efficient way for us to establish the liability of
17 the conspiracy and the violation that we have a strong statute
18 of limitations argument, because they were hiding what they
19 were doing, okay, is to go to these defendants, your Honor.

20 THE COURT: Let me push back in this way. First with
21 a question. Understood on these six defendants. Are you
22 asking from the six the same information or what?

23 MR. GILBERT: We're asking for the information about
24 their violation of need-blind.

25 THE COURT: Okay. I'm being very specific in what

1 I'm asking -- let me be very clear on what I'm asking. When I
2 say "this information," what I mean is information that would
3 assist you in determining whether admissions were tied to
4 donations. Are you asking for that from the other 11?

5 MR. GILBERT: Yes. And as to your question about
6 getting something -- I want to do it in response to your
7 question about getting something.

8 THE COURT: No, no, no. Hang on. What you told me a
9 second ago was that it's most efficient to go to these six. I
10 get that. They're the major malefactors of what you're
11 contending, in other words, but you're also going to the other
12 11. So it's kind of hard to swallow it's the most efficient
13 argument if you're doing it from everybody.

14 MR. GILBERT: Well, your Honor, we had actually
15 addressed what you said as sort of a proportionality. We had
16 made a compromise offer that we want to take the depositions
17 of six specific people. We're authorized to take ten
18 depositions at every defendant. Okay? And we said, no, we
19 just want six specific individuals for depositions on this
20 issue.

21 THE COURT: You're deciding them by title or by
22 function, I'm assuming?

23 MR. GILBERT: Mr. Sassorossi, his job was to --

24 THE COURT: You don't need to give me the details.

25 MR. GILBERT: But you understand the point, I'm sure,

1 your Honor.

2 THE COURT: Okay. Who is going to address this on
3 the defense side?

4 MR. LITVACK: Your Honor, Doug Litvack for Dartmouth.

5 THE COURT: You're just going to need to keep your
6 voice up because since you're so far away from the mic, it
7 sounds like you're talking from the bottom of a barrel.

8 MR. LITVACK: Sure. I'll keep my voice up. I
9 apologize for that.

10 THE COURT: By the way, that is great art in the
11 background. You win the background contest for today.

12 MR. LITVACK: I'll be sure to let the firm know that,
13 your Honor.

14 Your Honor, to Mr. Gilbert's point, I just want to
15 address a few things that Mr. Gilbert said. First,
16 Mr. Gilbert is conflating the exemption with liability. Those
17 are two distinct issues in this case. There's antitrust
18 liability, which he conceded has nothing to do with admission
19 practices. And then there's the narrow question of the
20 exemption.

21 And, your Honor, you spent a good amount of time in
22 the motion to dismiss order interpreting the exemption and
23 giving us guidance on what the exemption means. And it's a
24 binary question. It's a very simple binary question of
25 whether schools' need admissions process consider an

1 applicant's financial circumstances in making an admissions
2 decision.

3 And the scope of discovery the plaintiff seeks is
4 completely, grossly disproportionate to the needs of the case.
5 They're seeking here, your Honor, 73 RFPs, and we put in our
6 declarations what that would entail in terms of work. Those
7 documents seek 25 years of information, hundreds of thousands
8 of documents --

9 THE COURT: Time -- time out. Time out.

10 MR. LITVACK: -- that's millions of dollars of
11 additional expense --

12 THE COURT: This motion doesn't talk about all 73.
13 So let's just talk about what this motion talks about.

14 MR. LITVACK: Your Honor, respectfully, it does talk
15 about all 73. Yes.

16 THE COURT: All 73, every one of the 73 is covered by
17 this motion?

18 MR. LITVACK: Correct, your Honor. Let me just
19 explain what we're asking for here. Your Honor, we're asking
20 for here a protective order from the discovery -- the grossly
21 disproportionate discovery the plaintiff seeks. We're not
22 saying that no discovery from us on these issues is
23 appropriate. However, the discovery that the plaintiffs are
24 currently seeking is completely disproportionate, and
25 Mr. Gilbert's compromise that he discussed, he didn't tell --

1 he failed to tell that they're seeking production of 37 of the
2 73 RFPs, doesn't meaningfully reduce the burden. We didn't
3 have any issue with the depositions. We had an issue with
4 spending millions of dollars and significant time and effort
5 for a defense that we're not asserting. And, frankly, there's
6 easier, more targeted ways to get the information that the
7 plaintiffs need for this narrow question.

8 THE COURT: Okay. So time out here. I'm just
9 looking at the request for production. So I understood this
10 motion as basically saying, don't make us, the six movants,
11 produce information about donations to the school and linkage
12 of that with admissions. Did I misread the motion?

13 MR. LITVACK: You did, your Honor.

14 THE COURT: Okay. It wouldn't be the first time I've
15 done that.

16 MR. LITVACK: It's also about admissions practices as
17 well, your Honor. Admission practices are equally as relevant
18 to plaintiffs' antitrust claim, as Mr. Gilbert explained.

19 THE COURT: Okay. Give me just a second here. I
20 just want to pull up something.

21 Bear with me.

22 So I guess maybe my problem is that nothing in your
23 memorandum tells me what the limitations are that you're
24 looking at. And the bulk of the discussion is under -- what I
25 see as the discussion is under heading II, Roman numeral II,

1 which says: "Discovery into admissions and development
2 activities of the moving defendants is not relevant to the
3 merits of the plaintiffs' claim or the statute of limitations
4 defense."

5 And so I guess I read that, you know -- you will
6 excuse me if I read it kind of consistently with the title,
7 Admissions and Development Activities, as this motion was more
8 or less targeted into the linkage between those two things.
9 And there's really nothing in the memorandum, which I'll just
10 point out is 15 pages that says, here's specifically what you
11 want me to do.

12 So just from kind of a consumer standpoint, me being
13 the consumer, that's a little problematic. So can you tell me
14 in a nutshell what you want me to do?

15 MR. LITVACK: Yes, your Honor. We want you to issue
16 a protective order that prohibits plaintiffs from enforcing
17 compliance of the 73 RFPs that were attached to our motion as
18 Exhibit C and -- so we're willing to entertain more targeted,
19 lesser forms of discovery --

20 THE COURT: So your proposal is strike everything,
21 and we start over. And we'll talk to you. That's what I got
22 from what you just said. Did I get it right?

23 MR. LITVACK: No, no, no, your Honor. No, your
24 Honor.

25 THE COURT: Okay. I don't want to paraphrase. Let

1 me read back to you what you said to me.

2 We want you to issue a protective order that
3 prohibits plaintiffs from enforcing compliance of the 73 RFPs
4 that were attached to our motion, and we're willing to
5 entertain more targeted, lesser forms of discovery.

6 So what -- how would a person in my shoes understand
7 that other than what I just said? Strike everything and start
8 over, and we'll talk to you. That's what you told me.

9 MR. LITVACK: Sorry, your Honor. Sorry, I didn't
10 mean to speak over you.

11 I didn't finish the part of what we're asking for
12 was --

13 THE COURT: I didn't interrupt you. I didn't
14 interrupt you.

15 MR. LITVACK: We're willing to submit, as our motion
16 suggested, written interrogatories as well as produce
17 documents sufficient to show whether our clients' admissions
18 departments did or did not consider an applicant's financial
19 circumstances in any way in making admissions decisions. We
20 think those two things will give the plaintiffs the discovery
21 they want related to the exemption and will be
22 proportionate --

23 THE COURT: Stop. Stop. What you just said, what
24 you said, where do I find that in the memorandum in support of
25 the motion? I guess it's just -- it's a motion. It's kind of

1 a speaking motion. Just point to me where I find that in the
2 motion because I guess I must have missed it. So tell me
3 where it is. I've got it pulled up in front of me.

4 MR. LITVACK: Your Honor, you didn't miss it in the
5 motion.

6 THE COURT: Because it's not in there. Because it's
7 not in there. I mean, seriously, folks. You guys gave me
8 like, you know, the book that I put together of all of this
9 stuff, I'm just going to tell you how many pages it's got in
10 it. 645 pages of all the stuff -- 645. That doesn't count
11 the 40-page status report from back in January. I mean,
12 what's the planet on which you don't put in your motion --
13 your 15-page motion for protective order exactly what you're
14 asking me to do? It's not this one. It's not the planet
15 Earth. Okay?

16 So basically when I asked you, point blank, tell me
17 what you want me to do, you said, don't make us respond to the
18 73 RFPs. And we're willing to entertain more targeted, lesser
19 forms of discovery. Translation, that's the only reasonable
20 translation of what you told me is strike the 73 RFPs. And if
21 you want to serve something else, we'll think about it. We're
22 willing to entertain it. That's just not a viable
23 alternative. And it's not in your motion. It's not in your
24 motion.

25 Here's the deal. I'm about ten seconds here from

1 just striking the motion because it doesn't describe the
2 relief you're asking for. So you get one more chance to tell
3 me why I shouldn't do that.

4 MR. LITVACK: Your Honor, in the motion, we do
5 request a protective order from all 73 RFPs. That's the
6 relief that we're seeking, your Honor.

7 THE COURT: Again, I'm going to ask you where in the
8 motion does it say that?

9 MS. VAN GELDER: Your Honor, this is Amy Van Gelder.

10 THE COURT: No, no. I am talking to a particular
11 person here. I am sorry. I'm going to deal with the person
12 who is talking to me here, who has taken up the last
13 12 minutes of my life that I'm never going to get back. Okay?
14 So tell me where in the motion I find it. I'm not saying it's
15 not in there. I just want you to tell me where I can find it
16 so I can look at it in black and white.

17 MR. LITVACK: Your Honor, it's -- first of all, it's
18 in the conclusion on page 15. And then we reference in the
19 introduction of the motion.

20 THE COURT: The conclusion on 15 says: "For the
21 foregoing reasons, the Court should grant this motion and
22 enter the proposed protective order as to the moving
23 defendant."

24 So it basically refers me to something else. That's
25 not containing it within the confines of the motion. Where is

1 it in the motion?

2 MR. LITVACK: Your Honor, it's on page 3 on the
3 last -- I'll just read it out loud, your Honor.

4 "Accordingly, the moving defendants seek a protective
5 order precluding discovery from the moving defendants with
6 respect to admissions and development activities including
7 through requests for production and search terms identified in
8 Exhibit C to Exhibit 1 of the motion."

9 It's in --

10 THE COURT: Time out. Again, when you file stuff
11 with a judge, okay, and you guys -- I mean, it's kind of a
12 foregone conclusion in any litigation that the judge is the
13 person who knows the least about it. The parties know about
14 it. The lawyers for the parties know about it. I know what
15 you told me. Okay? So here's what you told me in the thing
16 that you just read, which is the last sentence of the full
17 paragraph on page 3:

18 A protective order precluding discovery from the
19 moving defendants "with respect to their admissions and
20 development activities," including through the requests for
21 production and search terms identified in Exhibit C to
22 Exhibit 1.

23 So, again, the last part of that refers me to
24 something else, and when I read this about admissions and
25 development activities, since the thrust of most of the actual

1 discussion had to do with contributions to the university, I
2 read the "and" as meaning and, linkage, in other words. You
3 didn't explain otherwise.

4 So now I'm actually going to go look at -- if I can
5 find it -- Exhibit C to Exhibit 1. Exhibit C to Exhibit 1.

6 So Exhibit C to Exhibit 1 is a spreadsheet -- it's a
7 19-page spreadsheet. It gives a bunch of search terms in it.
8 Honestly, again, that doesn't tell me -- okay. This has kind
9 of been a waste of 20 -- we're now up to about 20 minutes.
10 It's kind of been a waste of 20 minutes.

11 So, look, I'm not going to make the plaintiffs go
12 back over from scratch. I'm just not. That's number one.

13 Number two, part of the reason why I'm not going to
14 make the plaintiffs go back to scratch is that unless
15 everybody withdraws the defense, which they have not, it's
16 seven out of -- or 6 out of 17, which is something like 33
17 percent or something like that, maybe 35 percent. It's
18 hornbook law of conspiracy, or at least the way this
19 conspiracy is defined and the way the exemption works is that
20 if other defendants -- and I already ruled on this in the
21 motion to dismiss. To the extent that what I'm about to say
22 varies from the motion to dismiss, I'm not intending that.
23 Basically says that everybody within the alleged group has to
24 have been complying with 568 in order for anybody to take
25 advantage of it.

1 Okay. Now, you might openly convince me that that's
2 not right. But as of right now, that's the operative
3 complaint and what it says and at least part of the basis on
4 which I sustained it. So the proposition that by some but not
5 all defendants withdrawing the defense, you've essentially
6 removed yourselves from the need to provide discovery on these
7 points really is not accurate. It's not right. It's
8 incorrect. And I'm not even thinking about the statute of
9 limitations issue.

10 If I had gotten a more targeted motion here -- which
11 I kind of thought I had, but I guess I didn't -- that says,
12 you know, limit it in various ways, I would have considered
13 it, but you haven't done that. And I don't think you've made
14 the case on disproportionality. The information is relevant.
15 The motion is denied.

16 Next.

17 MR. GILBERT: Your Honor, may I address one more
18 issue regarding if the 17 withdrew the defense?

19 THE COURT: So wait a second. I just ruled in your
20 favor on the motion.

21 MR. GILBERT: Right, right.

22 THE COURT: Are you going to try to talk me out of
23 it?

24 MR. GILBERT: We're delighted by that, your Honor.
25 But I would like --

1 THE COURT: What do I need to hear about it then?

2 MR. GILBERT: That's fine, your Honor.

3 THE COURT: No, I don't need to hear more about it.

4 So I think now we're over to the stuff in the status
5 report. And let me check my time here. So we're down to
6 basically about our last 10 or 12 minutes that I've got for
7 this.

8 Okay. I'm looking at the January 13th status report.
9 Bear with me. I'm pulling it up.

10 A question for the plaintiffs: On page 28 of the
11 status report -- and it would be helpful if you could look at
12 that -- there's a paragraph that says: "Plaintiffs also have
13 less burdensome avenues of discovery available to determine
14 whether an applicant's financial circumstances influenced the
15 decision of an admissions officer. For example, some
16 defendants have proposed that before adding these custodians,
17 plaintiffs propound interrogatories relating to defendants'
18 admissions policies or conduct a 30(b)(6) deposition of an
19 individual in the admissions office to determine if donations
20 are considered as part of admissions decisions."

21 So that kind of sounds like a good idea to me.
22 What's wrong with it?

23 MR. GILBERT: Two things, your Honor. I might be
24 mistaken, but I believe there's only a very small minority
25 that have actually proposed that. But more fundamentally, the

1 records of interest are not in the admissions office. The
2 records that show the tying of the donation and the admissions
3 is where the deal was made, and the deal was made between the
4 development office and the donor or by the president of the
5 university and the donor. That's why Morton Schapiro of
6 Northwestern looked at 550 applications and spoke to the
7 admissions office about it. He could tell them orally, which
8 is certainly strongly implied by the article of the
9 Northwestern student newspaper that that's what he did. He
10 told the admissions office orally what to do.

11 So the real records tying the donation to the deal
12 are not in the admissions office.

13 THE COURT: Why wouldn't there be in that situation?
14 I mean, wouldn't there be like a notation in the file or
15 something like that, that the president of the university
16 said, admit this person?

17 MR. GILBERT: There may be -- you're absolutely
18 right, your Honor. There may very well be, "Schapiro said
19 admit." Okay? We then miss all the why he said admit. Okay?
20 What was the basis? How much money donated? And what was the
21 negotiation of the donation?

22 THE COURT: Again, the proposal isn't that instead of
23 adding these custodians. The proposal, as I read it, is
24 before adding these custodians, "the custodians" being the
25 ones in the development and the president's office.

1 MR. GILBERT: All right. Well --

2 THE COURT: I mean, in other words, let's say
3 university X, somebody, you know, that qualifies as a 30(b)(6)
4 deponent or, you know, by their title or by, you know, being
5 educated about it or whatever comes in and says, it's never --
6 I guess -- apparently, if I'm reading this stuff right, MIT is
7 going to say this. It's never happened in recorded history
8 that we've been told by the development office or the
9 president's office to give more weight to this person or admit
10 this person or look at their application again or anything
11 like that.

12 So, I mean, I -- that's the way I'm reading this is
13 that before you tell them, okay, go look in the admission --
14 go look in the development and the president's office, let's
15 at least find out if there's some basis to believe that those
16 kind of communications coming from one of those two places or
17 both of them are happening.

18 MR. GILBERT: As long as we're not excluding these
19 custodians, I think that's going to, your Honor, very much
20 extend the life of the discovery because we think we know
21 exactly where to go. As we said, we think we have six names
22 where we think we could prove this, take six depositions, and
23 be done with it. To go through the admissions office --

24 THE COURT: You better watch out how many times you
25 say that.

1 MR. GILBERT: Okay. In terms of efficiency, we think
2 that's the most efficient way to go, rather than go to people
3 who, at most, may have received a note --

4 THE COURT: What if I were to say, fine, rather
5 than -- at least initially, rather than sending, you know,
6 putting the development and the president's office and all 17
7 schools on the custodian list, if you've got these six people
8 that you want to depose, you know, ask for their records.

9 MR. GILBERT: I believe we've asked for that, your
10 Honor.

11 THE COURT: I understand. But, I mean, in other
12 words, let's pause the rest of it.

13 MR. GILBERT: That would be -- that would be
14 acceptable to us, your Honor, that if we had those six --

15 THE COURT: So thanks. You said "acceptable." I'll
16 take a yes.

17 So let me turn over to the defense side here. So the
18 proposal on the table is pause generally the inclusion of the
19 president and development office among the custodians with the
20 exemption of these six -- I forget which ones they are -- the
21 six institutions that plaintiffs' counsel is talking about,
22 Mr. Gilbert. So somebody from the six that wants to answer
23 that.

24 MR. DUSSEAUT: Your Honor, do you want to hear from
25 someone from the six? This is Chris Dusseault. I'm the one

1 addressing the issue more generally of the compromised
2 proposal.

3 THE COURT: It probably makes sense for somebody from
4 one of the six to answer that, I think, given what the
5 suggestion is that I put on the table.

6 MR. ROELLKE: Your Honor, it's Jon Roellke for Brown
7 University. I think that proposal kind of stands us on its
8 head and that --

9 THE COURT: That's what I thought you were going to
10 say is that should be -- since we withdrew a defense, we
11 should have less stuff, not more, and now we're getting more.

12 MR. ROELLKE: Yeah, precisely, your Honor. And I
13 think the proposition that the plaintiffs assert that they
14 already have dispositive evidence that those six or the folks
15 that they want to depose engaged in not need-blind practices
16 proves too much. If they already have the evidence, I don't
17 know why they need more. And certainly with respect --

18 THE COURT: Have you ever heard of testimony? I
19 mean, as opposed to an article in a student newspaper? You
20 get that, right? What you just said proves too much.

21 MR. ROELLKE: Your Honor, my point being that to --
22 and we aren't asking the plaintiffs to start from scratch on
23 this. This relates solely to the issue of whether or not
24 they're entitled to discovery of need-blind practices for
25 purposes of the exemption. There's 140 document requests, 73

1 of which relate solely to the application of the exemption.
2 And those are the requests that we are seeking to foreclose
3 the plaintiffs --

4 THE COURT: I've ruled on that motion. We're talking
5 about something else now. Seriously.

6 MR. ROELLKE: Well, it relates to the question of
7 whether or not discovery of entity of schools that do not rely
8 on the exemption is appropriate. And if what the proposal on
9 the table is that discovery of the schools that have moved for
10 a protective order should in the first instance be limited to
11 a deposition and not preceded by the 73 different document
12 requests that relate to the application --

13 THE COURT: Okay. So let me just give you a
14 hypothetical which probably isn't all that hypothetical.
15 Let's say we did that. And so Mr. Gilbert lays a subpoena on
16 the president of Northwestern. I don't know if he's still a
17 president or not. Let's just assume he is. Lays a subpoena
18 on the president of Northwestern. Says, okay, what about it,
19 Mr. So-and-So, or Dr. So-and-so? Did you say this? I don't
20 remember.

21 What about -- did you ever, you know, put in a call
22 or send any kind of communication to the admission office
23 about, you know, an applicant whose family had given a lot of
24 money? Well, I don't remember.

25 Did you do it with regard to -- and then he quotes

1 something from out of the student newspaper? I don't recall
2 one way or another.

3 We all know stuff like that is going to happen. It
4 might not be a hundred percent across the board. We're
5 talking about -- just by definition, we're talking about stuff
6 that happened 8, 10, 12, maybe more years ago. People aren't
7 going to remember. You're talking about busy people who've
8 got -- it's kind of like a judge or a lawyer. They've got 57
9 things they're doing. This is one of them. They're not going
10 to remember details of that.

11 So, I mean, unless you were willing to say, okay, so
12 if -- I tell Gilbert, okay, Gilbert, you got to go take these
13 six depositions, just do it with what you've got right now.
14 Unless you're willing to say, on the defense side, if we get
15 any "I don't know" out of those depositions, then I'm going
16 to let them go back and get the documents and then make the
17 person appear again to answer the questions they didn't
18 remember the first time. Unless you're willing to say that,
19 in other words, agree that the person could sit for a second
20 deposition if they don't recall something significant, which
21 I'm betting you won't do, that's my bet, then what are we
22 talking about? Would you do that? Would you agree to that?

23 MR. ROELLKE: Your Honor, I understood the proposal
24 to be that in order to --

25 THE COURT: No, no, no, don't respond to somebody

1 else's question. Respond to mine. Seriously. It's not one
2 of those Sunday morning talk shows where, you know, George
3 Stephanopoulos asks a question and then whoever is answering
4 it just gives their talking points. That's not the way it
5 works. It's a real question and answer. You have to actually
6 answer the question. So it's my question. Just answer it.

7 MR. ROELLKE: And I don't understand how that would
8 solve the proportionality problem that we're trying to
9 address.

10 THE COURT: Here's how it would solve it, because you
11 just said that, hey, if he's got these six smoking guns here,
12 just take those depositions and be done with it. And don't
13 make us cough up the documents. So my comeback was what
14 happens if one of those people doesn't remember something
15 that's significant? Would you be willing to make him sit for
16 a second time and get the documents in between? That's the
17 question I asked you, and you basically answered me with a
18 non-answer twice. Let's try for three.

19 MR. ROELLKE: I just speak for Brown University, your
20 Honor. To the extent that the plaintiffs want to take a
21 deposition of Brown University --

22 THE COURT: We have somebody who is signed in from
23 two devices in the same room. That's why we're getting the
24 echo. So if you did that, please turn off the second device.

25 Thanks. Go ahead.

1 MR. ROELLKE: For Brown University, if the plaintiffs
2 forego what we believe to be oppressive and burdensome
3 document discovery in exchange for a deposition to address the
4 issues that we think are disproportionate, we would -- and
5 that witness did not provide sufficient facts to satisfy the
6 plaintiffs as to particular questions, we would then be
7 prepared to pursue the document discovery that, again -- if it
8 was proportional -- and permit that witness to be deposed
9 again as to those documents.

10 THE COURT: I think I counted five hedges in there.
11 Who represents Northwestern?

12 Mr. Stein. Okay. Since the hypothetical concerned
13 the president of Northwestern, what's your view about this?
14 You're muted right now. I can't hear you. You're muted.

15 MR. STEIN: I'm sorry, your Honor. Can you hear me?

16 THE COURT: There you go. Yes.

17 MR. STEIN: Scott Stein. The lead for Northwestern.
18 Just to answer one question you articulated,

19 Mr. Schapiro is now the former president of Northwestern.

20 THE COURT: I kind of thought that, yeah. Okay.
21 Right.

22 MR. STEIN: But if I understand -- if I'm
23 understanding correctly what your Honor is proposing -- we
24 heard you on the protective order motion. Our concern, if
25 there's going to be discovery on these issues, is to make it

1 proportional, right? And to the point that this is really a
2 binary issue and the issue that the plaintiffs are focused on
3 is, is there evidence that schools, Northwestern and other
4 schools, considered the financial circumstances of certain
5 students or families, then what your Honor is proposing seems
6 a reasonable way to get at that.

7 In other words -- and Mr. Schapiro, by the way,
8 President Schapiro, Former President Schapiro, was also the
9 vice chair of the 568 group. He's going to be deposed.
10 There's no question he's going to be deposed. And I have
11 little doubt that in a deposition, the plaintiffs would be
12 able to get the evidence that they'll argue is sufficient for
13 them to make the arguments they want to make on the
14 applicability of the 568 exemption. I hear you. If there's a
15 lot of "I don't know," of course, I can't say they have to be
16 bound in advance.

17 But I think we would be able to make a strong showing
18 after such a deposition that they have what they need, as
19 they've articulated today. And we don't need to produce
20 20 years of donor records and admissions data. Let's do this
21 quickly, efficiently. And I think that will be -- frankly, I
22 think that will satisfy both sides' concerns.

23 MR. GILBERT: Your Honor, may I address that, please?
24 This is Robert Gilbert.

25 THE COURT: Sure. Go ahead.

1 MR. GILBERT: The other point that has not been
2 raised is the admissions decisions and whether it was wealth
3 favoritism applies to whether the per se rule or the rule of
4 reason or Brown doctrine applies. In the Brown case about the
5 overlap group, the key issue was were the universities
6 altruistic or were they revenue maximizing. If they engage in
7 wealth favoritism, that would be another indication that they
8 were not purely altruistic, which was the standard in the
9 Brown case, but instead revenue maximizing. So that's another
10 area of why this is important even if 17 conceded that the --
11 on the -- the exemption does not apply.

12 THE COURT: Okay. Folks, you've kind of reached the
13 end of my available time for this. So I'm going to -- I guess
14 what I'm going to do is kind of apply a hopefully somewhat
15 sharpened meat ax approach. That would be m-e-a-t, a-x,
16 approach. And I know that this isn't directly teed up with
17 what we're talking about.

18 So right now, if I'm counting right, between the
19 first and second document requests that the plaintiffs served,
20 there's 179 requests for production, 173 plus 6. Is there a
21 third or fourth, or is that the universe right now? Just yes
22 or no? Somebody say yes or no on the plaintiffs' side or on
23 the defense side.

24 MR. GILBERT: There is a third.

25 THE COURT: How many are in the third? Just ballpark

1 it. 10, 20, 30, 40, 150?

2 MR. STEIN: I think it's much closer to 20.

3 MR. GILBERT: 13.

4 THE COURT: Okay. So that takes us up to 192.

5 So here's what I'm doing. Did I put -- was there any
6 kind of -- in the earlier orders, did I say you get this many
7 interrogatories and this many RFPs?

8 MR. STEIN: Yes.

9 THE COURT: What was the number?

10 MR. STEIN: 45 interrogatories. I don't believe
11 there was a limit on number of RFPs.

12 THE COURT: There is now. So you get to pick your
13 best 100. You get to pick your best 100.

14 And as far as adding the development and president's
15 office as custodians, I'm putting the pause on that for now.
16 For now. We're going to readdress that in a couple of months
17 once stuff is actually getting produced. I have to get this
18 thing off the dime. So we're going to put the pause on having
19 custodians from the development and the president's office
20 right now.

21 Here's what that means for the defendants. I want to
22 make it real clear what that means for the defendants. Okay?
23 What that means is if I later determine that there's a basis
24 to include those for some or all of the defendants, you're not
25 going to get a whole lot of time to produce the stuff, and

1 you're not going to get to do it at anybody's leisure. It's
2 going to be my definition of how quick you get it done. So
3 that's the condition.

4 I don't have any more time to give you folks today.
5 I got to start in three minutes an argument about patents and
6 computer processors, which is going to make this look like a
7 discussion of an action movie by comparison.

8 MR. MORSCH: Your Honor, James Morsch, on behalf of
9 Duke. I just want to give your Honor advance notice of
10 something that wasn't on the agenda today. The defendants
11 filed an extension -- for an extension of the structured data
12 deadline that was filed as item 313.

13 THE COURT: That got filed yesterday. That just got
14 filed yesterday. I saw something got filed.

15 MR. MORSCH: Yes, that's a little bit time sensitive.

16 THE COURT: Hang on. Stop, stop, stop, stop, stop,
17 stop, stop. I'm just pulling it up. It will just take a
18 second for it to come up here.

19 Here it is. You're asking to extend the structured
20 data deadline to March the 13th.

21 MR. MORSCH: That's right.

22 THE COURT: Do the plaintiffs have a problem with it?

23 MR. GILBERT: Yes, your Honor. We're going to file a
24 brief --

25 THE COURT: No, you're not. No, no, no.

1 MR. GILBERT: We'll file an opposition in two days.

2 THE COURT: No. You're going to tell me right now
3 what the problem with it is.

4 MR. GILBERT: The problem is, number one, it's not
5 accurate. It misrepresents what was represented to the
6 defendants.

7 Second is its meritless; that is, the anonymization
8 could have started on November 22nd. The first we even heard
9 there was a problem was on February 3rd. The first time it
10 was explained was two days ago. Our experts have said this
11 can be done much faster. Essentially, they've presented a
12 fait accompli to the Court, basically telling the Court, this
13 is the way it's going to be. They're violating two deadlines,
14 not one. It requires them to violate also the deadline on
15 March 3rd, which is court ordered. Okay? Which they don't
16 mention --

17 THE COURT: What's that deadline? What's on March
18 3rd?

19 MR. GILBERT: That is for the substantial response to
20 all RFPs, many of which are structured data. So now there's
21 two deadlines they're blowing.

22 And we're prejudiced. In order to get the number of
23 depositions done in this case, we had indeed -- indeed hired
24 additional people -- to start the depositions in mid April so
25 we could get done by the beginning of next year, which is,

1 again, the court deadline. And our ability to start the
2 depositions in mid April has been prejudiced.

3 So for all of those reasons, we oppose the motion.
4 And they have not even said there's going to be a rolling
5 production is another thing. We were told there would be a
6 rolling motion. All they said is in the motion was there was
7 going to be data in a month.

8 THE COURT: Stop on that. Stop on that.

9 And, Mr. Morsch, you brought this up, so I'm hereby
10 appointing you the spokesperson. So if I give you an
11 extension, is it going to be -- pardon me one second here --
12 is it going to be a dump on that date, or is it going to be
13 rolling production between now and then?

14 MR. MORSCH: It's going to be a rolling production,
15 as we stated in the motion itself.

16 THE COURT: You get three weeks, not four. It's
17 extended to the 6th of March.

18 MR. MORSCH: Thank you, your Honor.

19 One other thing. Item 2, which you talked about, the
20 depositions, there was a little bit of a stun silence you may
21 have seen when you raised that issue. You issued an order on
22 February 12th.

23 THE COURT: Okay. Good, then. Never mind.

24 MR. MORSCH: Did you mean to revisit that order?

25 THE COURT: I didn't.

1 MR. MORSCH: Okay. Thank you, your Honor.

2 THE COURT: If I already ruled on it -- hey, I got a
3 lot of stunned silences during this thing, so I can't really
4 read much into it, other than the sound doesn't work that
5 well. So it's not my intention to revisit the order. I just
6 thought that was still on the table.

7 I got to end this, folks, because, as you can see,
8 I'm having a hard time even talking.

9 MR. GILBERT: Your Honor, I apologize. But there's
10 two reasons I need to address from the hearing commission.

11 THE COURT: I got to this end this now. I got to
12 this end this now. The hearing is concluded. File something
13 else. I don't want to have to go through the 469 pages again
14 or whatever it was. The hearing is concluded.

15 Thanks. Bye.

16 (Which were all the proceedings had in the above-entitled
17 cause on the day and date aforesaid.)

18 I certify that the foregoing is a correct transcript from
19 the record of proceedings in the above-entitled matter.

20 /s/ Carolyn R. Cox, CSR, RPR, F/CRR February 9, 2023
21 Official Court Reporter
22 United States District Court
23 Northern District of Illinois
24 Eastern Division
25